

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JULY 1, 2013 to JULY 31, 2013

I. APPEALS

- A. Walters v. Smith
[2011-CA-001026](#) 07/05/2013 2013 WL 3369308 (DR Pending)

Opinion by Chief Judge Acree; Judges Lambert and Moore concurred.

The Court of Appeals reversed and remanded an order requiring appellants to pay appellees attorneys' fees for previously having filed an allegedly frivolous appeal. The Court held that: (1) the circuit court lacked jurisdiction to enter the order, having lost jurisdiction ten days after it entered the judgment from which the first appeal was taken; (2) the circuit court lacked the authority to sanction parties for frivolous appeals, CR 73.02(4) having granted that authority exclusively to the appellate court which, in that first appeal, was the Court of Appeals; and (3) appellees waived the right to assert that the first appeal was frivolous when they failed to make a proper motion pursuant to CR 76.34, in the first appeal, for the relief provided by CR 73.02(4).

II. ARBITRATION

- A. Scott v. Louisville Bedding Co.
[2012-CA-000252](#) 07/12/2013 2013 WL 3480312

Opinion by Judge Keller; Judges Stumbo and Thompson concurred.

A self-insured employer that participated in a trust in order to obtain indemnity for the risks of being self-insured brought an action against the trust, trust administrator, and the president of the trust administrator, alleging claims including fraud, misrepresentation, deceit, breach of contract, and unjust enrichment. The president of the trust administrator filed a motion to compel arbitration that was denied. The Court of Appeals affirmed the denial. The Court held that while the president was entitled to seek enforcement of the arbitration provisions in the parties' agreement even though he was not a signatory, the agreement was effectively an "insurance contract" so as to render the arbitration provisions unenforceable under the Kentucky Uniform Arbitration Act (KUAA). The Court also held that the employer was not an insurer for purposes of KRS 417.050(2), which permits enforcement of arbitration agreements in insurance contracts between insurers. The Court then held that the KUAA was, by virtue of the McCarran-Ferguson Act, exempt from preemption by the Federal Arbitration Act (FAA) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which do

not exempt insurance contracts from arbitration. The Court finally held that the subject arbitration provisions did not fall within the scope of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, even though the insured was a domestic entity and the insurer was incorporated in Switzerland, since the insurer's principal place of business was in the United States.

B. Wagner v. Drees Co.

[2012-CA-000241](#) 07/26/2013 2013 WL 3835422

Opinion by Judge VanMeter; Judges Caperton and Maze concurred.

The Court of Appeals affirmed an order denying homeowners' motion to vacate, or deem void, an arbitration order that dismissed their claims against a home builder on statute of limitations grounds. The Court held that the arbitrator did not exceed the scope of his authority by dismissing the claims on statute of limitations grounds and without providing homeowners with a hearing. The arbitrator was given full authority by the parties to resolve the matter, and at no time did homeowners request a hearing before the arbitrator. Homeowners were also given the opportunity to respond to the home builder's motion to dismiss, which they did without ever questioning the arbitrator's authority to consider the dispositive motions. Moreover, in their petition for reconsideration filed with the arbitrator, homeowners did not challenge his authority or object to his decision on procedural grounds.

III. CHILD SUPPORT

A. Seay v. Seay

[2012-CA-001786](#) 07/05/2013 2013 WL 3357603 (Released for Publication)

Opinion by Judge Caperton; Judges Clayton and Taylor concurred.

The Court of Appeals reversed and remanded the circuit court's denial of husband's motion to reduce his child support obligation. The Court concluded that KRS 403.213(3) expresses an unequivocal intent by the legislature that child support be terminated upon emancipation of a child absent application of the statutory exception. Therefore, the Court held that the emancipation of a child is a singular event that triggers a mandatory review of the current child support obligation of a party based on the facts and circumstances post-emancipation.

IV. CITIES

A. Short v. City of Olive Hill

[2012-CA-000873](#) 07/26/2013 2013 WL 3835834 (Rehearing Pending)

Opinion by Judge Caperton; Judges Maze and Thompson concurred.

The Shorts appealed the grant of summary judgment in favor of the City of Olive Hill concerning the enforcement of a lien assessed by the City against property owned by the Shorts. The lien was assessed due to a code violation prohibiting excessive weed growth. The Shorts argued that Olive Hill violated their due process rights and filed the lien against them illegally. Olive Hill cross-appealed, requesting reversal of that portion of the circuit court's judgment requiring the city code enforcement board to provide "enhanced delivery" of its enforcement order against the Shorts. Of particular note, the Court of Appeals held that: (1) the applicable nuisance ordinance was not unconstitutionally vague or arbitrary with respect to the identification of weeds and vegetation that would constitute a nuisance; (2) the action was not invalid for failure to include an indispensable party; (3) the action was not invalid due to a failure to re-administer the oath of office to one board member upon her reappointment to the board; and (4) while Olive Hill had failed to provide the statutorily-required "enhanced service" of the enforcement order by either certified mail, personal delivery, or delivery to the Shorts' home, summary judgment was nonetheless warranted because the Shorts failed to file a timely appeal with the district court, even after they did receive the written order.

V. CRIMINAL LAW

A. Duncan v. Commonwealth

[2011-CA-000636](#) 07/19/2013 2013 WL 3816017 (Rehearing Pending)

Opinion by Judge Clayton; Judges Stumbo and Thompson concurred.

The Court of Appeals concluded that the recent opinion of the United States Supreme Court in *Missouri v. McNeely*, --- U.S. ----, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), required reversal of a DUI conviction where the defendant refused to submit to a blood test as requested by the arresting officer. The Court bases its conclusion upon language in *McNeely* stating that the natural metabolism of alcohol in the bloodstream does not constitute a "per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." The Court further cited *McNeely* for the proposition that neither Kentucky's implied consent statute, nor the Kentucky Supreme Court's interpretation of that statute, provided a sufficient basis for upholding a police department policy that permitted its officers discretion as to whether to administer a breathalyzer or to require a blood test.

B. Keysor v. Commonwealth
[2009-CA-001639](#) 07/12/2013 2013 WL 3480377 (DR Pending)

Opinion by Judge Clayton; Judges Moore and Nickell concurred.

The Court of Appeals affirmed the denial of appellant's motion to suppress statements made to law enforcement. Citing to *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), the Court held that uncounselled statements made by a defendant to police in Marshall County that incriminated the defendant in a criminal action pending in Graves County were admissible at the Graves County trial. This held true even though the defendant was represented by counsel in the Graves County action at the time he gave the uncounselled statements in Marshall County.

VI. EMPLOYMENT

A. Kentucky Unemployment Ins. Com'n v. Watts
[2012-CA-000911](#) 05/31/2013 2013 WL 2394856

Opinion by Judge Moore; Judges Dixon and Taylor concurred.

The Court of Appeals reversed a circuit court judgment that had reversed the decision of the Kentucky Unemployment Insurance Commission to grant appellee only two weeks of unemployment insurance benefits. The case involved a situation where appellee gave her employer a two-week notice of voluntary resignation and the employer terminated her employment prior to the end of that two-week notice period. The Court held that reversal was erroneous because appellee never raised an argument relating to whether she had "good cause" for resigning, which - pursuant to *Thompson v. Kentucky Unemployment Ins. Com'n*, 85 S.W.3d 621 (Ky. App. 2002) - is a necessary consideration under these circumstances. The Court also held that the circuit court had no justification for raising the issue of "good cause" *sua sponte*. The Court further held that no Kentucky authority stands for the proposition that if an employer fails to contest a worker's claim for unemployment benefits, the worker must be awarded unemployment benefits. It is the worker's burden to establish good cause for quitting employment to demonstrate any entitlement to unemployment benefits.

B. Pennington v. Wagner's Pharmacy, Inc.
[2012-CA-000573](#) 07/12/2013 2013 WL 3480307 (DR Pending)

Opinion by Judge Combs; Judge Clayton concurred in result; Judge VanMeter concurred in result only.

The Court of Appeals vacated and remanded the circuit court's entry of summary judgment in favor of appellee in a disability discrimination action. The Court held that appellant had established that her morbid obesity constituted a disability under KRS 344.010(4) and that there were questions of fact as to whether the disability was the basis of her employment termination. The questions of fact were presented in the form of affidavits that were admissible double hearsay.

VII. FAMILY LAW

A. Ensor v. Ensor
[2010-CA-001660](#) 07/26/2013 2013 WL 3835421

Opinion by Judge Nickell; Judges Moore and Thompson concurred.

The Court of Appeals affirmed in part, reversed in part, and remanded a judgment concerning the valuation and division of property, maintenance, and the assessment of post-judgment interest in a dissolution action. The Court held that the circuit court erred in including a Grantor Retained Annuity Trust in the marital estate. Where there was no showing of a fraudulent or dissipative transfer, the creation and funding of an irrevocable estate planning trust removed the transferred assets from the marital estate and, therefore, wife did not retain an equitable interest in the trust assets.

B. Ipock v. Ipock
[2012-CA-001271](#) 07/05/2013 2013 WL 3357609 (Released for Publication)

Opinion by Judge Maze; Judge Caperton concurred; Judge VanMeter concurred in result only.

The Court of Appeals affirmed an order permitting the Cabinet for Health and Family Services (CHFS) and a child's guardian ad litem (in a neglect case) to intervene in the parties' divorce action after a paternity test indicated that appellant was not the child's biological father. The Court held that intervention was appropriate due to similar legal issues in the two cases - namely, whether appellant was truly the child's father. The Court also affirmed the trial court's vacatur and amendment of its prior order regarding paternity and custody of the child. While the Court concluded that the trial court abused its discretion in citing fraud as a basis for its decision, it agreed with the trial court that the result of the paternity test constituted "newly found evidence" justifying amendment of the custody decree pursuant to CR 60.02. As to the latter point, the Court emphasized that in cases such as this one where a party employs CR 60.02 to disestablish paternity and seeks to do so with the results of an already-completed DNA test, the results of that

test shall be the predominant factor in the trial court's decision. This holds true even though long-standing public policy strongly opposes leaving a child fatherless.

C. Muir v. Muir

[2012-CA-000853](#) 07/26/2013 2013 WL 3835809

Opinion by Judge Lambert; Judges Caperton and Maze concurred.

The Court of Appeals affirmed an order dissolving the parties' marriage and dividing the marital property. The Court first held that the disposition of property that belonged to wife's uncle prior to his death could not be resolved by a stipulation of the parties because the disposition of such property was a matter for resolution by the probate court. The Court also held that the trial court gave adequate consideration to the applicable statutory factors in awarding wife, as marital property, a home deeded to her by her uncle. The parties only cohabited as a married couple for approximately four years, during which wife worked and supported herself and husband received disability. Husband also had a home of his own and did not need the marital residence for living purposes. Moreover, wife paid for the improvements to the property and paid property taxes on it throughout the parties' marriage. The Court further held that wife was not required to trace the non-marital portion of her state retirement benefit in order to establish that such portion was her non-marital property.

D. Triplett v. Triplett

[2011-CA-002076](#) 07/05/2013 2013 WL 3357645 (Rehearing Pending)

Opinion by Judge Lambert; Judges Caperton and Maze concurred.

The Court of Appeals affirmed the family court's entry of orders regarding the division of a husband's pension. On appeal, the wife argued that the family court should not have used a coverture fraction to identify the marital and non-marital portions of the husband's pension but instead should have used a subtraction method or "bright line" rule. The Court held that the wife failed to preserve her arguments for review on appeal by first raising them before the family court. However, the Court noted in dicta that there did not appear to be an abuse of discretion in the family court's designation of the pension.

VIII. INSURANCE

A. Progressive Max Ins. Co. v. Jamison

[2011-CA-001127](#) 07/19/2013 2013 WL 3778135

Opinion by Chief Judge Acree; Judges Moore and Thompson concurred.

In an appeal and cross-appeal following a trial to resolve a defendant's claim for underinsured motorist benefits, the Court of Appeals held that the trial court committed reversible error by failing to apply two statutory setoffs to the jury's damages award: (1) a reduction for basic reparations benefits paid pursuant to KRS 304.39-060(2)(a), and (2) a reduction representing the tortfeasor's liability insurance policy limits pursuant to KRS 304.39-320. The Court further held that once fault was established against the tortfeasor and the underinsured-motorist claim was resolved, the defendant insurance company was entitled to collect on its properly-preserved subrogation cross-claim. As to the cross-appeal, the Court held that the trial court's ruling preventing the plaintiff from specifically identifying the defendant insurance company as his underinsured-motorist carrier did not offend the mandates set forth in *Earle v. Cobb*, 156 S.W.3d 257 (Ky. 2005) since the insurer was identified as a real party in interest. Likewise, there was no error in the trial court's decision to restrict the parties from discussing insurance or underinsured motorist benefits during trial.

B. Riggs v. State Farm Mut. Auto. Ins. Co.

[2012-CA-000354](#) 07/19/2013 2013 WL 3778143

Opinion by Chief Judge Acree; Judge Taylor concurred; Judge VanMeter dissented and filed a separate opinion.

The Court of Appeals reversed and remanded the circuit court's entry of summary judgment against appellant as to appellant's underinsured-motorist claim. The circuit court had found the claim to be contractually time-barred. In reversing, the Court declared unreasonable, and therefore invalid, a two-year contractual limitation provision requiring any action for underinsured motorist benefits to be brought within two years from the date of injury or the last basic reparations benefit paid, whichever is later. While the contractual limitation did not require the injured party to sue his or her UIM carrier prior to suing the tortfeasor, the limitation had the possibility of compelling an insured to file a protective suit against his or her carrier before the two years elapsed, even though a prior suit against the tortfeasor might not yet have yielded discovery that would disclose any need to pursue UIM coverage. Absent a reasonable contractual provision providing otherwise, the fifteen-year limitations period set forth in KRS 413.090(2) controlled.

IX. NEGLIGENCE

A. Patton v. Bickford

2012-CA-000598 07/19/2013 2013 WL 3778148

Opinion by Judge VanMeter; Judges Clayton and Lambert concurred.

In a wrongful death action against middle school teachers, a principal, and superintendents, in their individual capacities, alleging negligence in failing to supervise students at school and to comply with anti-bullying policies and procedures (which resulted in a student being subjected to bullying and eventually taking his own life), the Court of Appeals held that the circuit court properly granted summary judgment in favor of the defendants. The Court first held that the defendants were not entitled to summary judgment on the grounds of qualified official immunity since their duty of care with respect to bullying incidents was set forth in the school's student handbook and their duties were partly ministerial in nature. However, the Court held that summary judgment was nonetheless appropriate because the student's act of suicide in his home was an intervening and superceding act that cut off any potential liability. The record did not reflect that anyone was aware that the student was suicidal, especially considering that his friends and parents were shocked by the incident. Additionally, when the student committed suicide in his home he was not in the direct care of the defendants.

X. NEW TRIAL MOTION

A. Simmons v. Simmons

2012-CA-000383 07/05/2013 2013 WL 3369421 (DR Pending)

Opinion by Judge Lambert; Judges Clayton and VanMeter concurred.

The Court of Appeals affirmed a jury verdict and judgment dismissing appellants' complaint in a dispute between siblings related to whether three of the siblings exerted undue influence over their mother to affect transfers of real and personal property. The Court held that appellants failed to establish jury bias or misconduct; that the circuit court properly declined appellants' request to inform the jury of the shift in the burden of proof; that appellants were not entitled to present their argument last during closing arguments; that the circuit court properly declined to instruct the jury on the tort of tortious interference with an inheritance due to appellants' failure to make a prima facie case (the Court did not reach the question of whether this tort has been recognized and adopted in Kentucky); that the circuit court properly admitted a letter written by the parties' mother prior to her death; and that the circuit court properly denied appellants' motion for a directed verdict.

XI. PROPERTY

A. Baker v. Hines

2012-CA-000340 07/19/2013 2013 WL 3778139

Opinion by Judge Lambert; Judges Moore and Taylor concurred.

In a property dispute regarding an easement that included a shared driveway, the Court of Appeals reversed the decision of the circuit court, holding that the attempt by the servient estate to build a fence along the edge of the easement between the two properties unduly restricted the dominant estate's full use of the express easement because it would impede the ability to access the dominant estate's entire property. In an issue of first of impression, the Court further held that in the absence of an agreement to the contrary in the document creating the easement, where an easement is jointly used by both the dominant and servient estates, the reasonable cost to maintain the easement should be equitably divided between the two estates.

XII. WILLS AND ESTATES

A. Strunk v. Lawson

2009-CA-001810 07/26/2013 2013 WL 3835360 (Rehearing Pending)

Opinion by Judge Nickell; Judges Caperton and Combs concurred.

In an action to determine rights under a will, the Court of Appeals affirmed the circuit court's determination that: (1) bequests of a total of 970 shares of stock in a bank that had been reorganized and was no longer publicly traded were really bequests of stock in the current bank holding company, even though reorganization occurred before the will was executed; (2) the bequests had to be multiplied by ten to account for a ten-for-one stock split that had occurred before the will was executed; (3) interpretation of the will was necessary due to latent ambiguity because the bank stock mentioned in the will had changed form and could not be distributed as identified in the will; (4) an *in terrorem* clause against the named heirs need not be enforced because an action for a declaration of rights is not a will contest and did not seek to invalidate any portion of the will; and (5) petitioners were entitled to costs and post-judgment interest from the entry of the first of two judgments where both contained finality language. The Court further held that the required posting of a supersedeas bond in "the amount of \$1,529,000.00 with good and sufficient corporate surety" was not an abuse of discretion. Regarding the supersedeas bond, where a monetary judgment had been neither requested nor awarded, and the only amount ordered to be paid was costs of \$2,151.27, the Court pointed out that district courts have exclusive jurisdiction over matters of probate and that while the circuit court may render a declaration of rights as to how an estate will be distributed, it cannot make

the actual distributions as that is the exclusive province of the district court. Noting that little has been written about supersedeas bonds, the Court limited its review to an evaluation of the sufficiency of the bond and concluded that the bond amount was clearly sufficient to ensure payment of the awarded costs.